IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-274

TIMBERLAND PACKING CORPORATION,
Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Thomas H. Mahan
Northwestern Bank Building
Helena, Montana 59601
Counsel for Petitioner

Of Counsel
Robert L. Johnson
507 Montana Building
Lewistown, Mt. 59457

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TIMBERLAND PACKING CORPORATION,
Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in its case no. 76-1300, National Labor Relations Board vs. Timberland Packing Corporation, on May 19, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix "A") has not yet been reported. That opinion and the resulting judgment (Appendix "C") enforce a decision and bargaining order of the National Labor Relations Board reported at 221 NLRB No. 137. The Board's decision and order in turn rest upon its Regional Director's decision (Appendix "B"), unreported, asserting NLRB jurisdiction over petitioner.

JURISDICTION

The NLRB proceeded against petitioner in the United States Court of Appeals for the Ninth Circuit pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, et seq.) and jurisdiction of this court to consider this petition is invoked under 28 U. S. C. 1254 and 29 U. S. C. 160.

INDEX

CITATIONS

Cases:

Statutes and Regulations:

QUESTIONS PRESENTED

1.

Was it unconstitutionally discriminatory against Timberland, an employer which cooperated in providing statistical information, for the NLRB to disregard its own representative year criterion and assert jurisdiction over Timberland even though Timberland's annual dollar volume was far below the NLRB's published threshold standards?

2.

Was it error for the United States Court of Appeals for the Ninth Circuit to support the NLRB's assertion of jurisdiction over Timberland on the theory that Timberland's employees would be left vulnerable were the circuit court to do otherwise, even though the NLRB wrongfully asserted jurisdiction in the first instance?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The National Labor Relations Act, 49 Stat. 449, the Labor-Management Reporting and Disclosure Act, 73 Stat. 519, and the jurisdictional standards declared by the NLRB in Siemons Mailing Service, 122 NLRB 81, are involved here.

STATEMENT

This matter involves an effort by a meat cutters' union to organize petitioner's four employees. Petitioner, Timberland Packing Corporation, is a small meat packing plant in Lewistown, Montana. Upon proceedings initiated by the union to bring about a Board supervised representation election a hearing was held and evidence adduced. The Regional Director asserted Board jurisdiction in spite of Timberland's contention the evidence showed it was too small to meet the Board's declared threshold standards. Timberland pursued its administrative remedies unsuccessfully and the Union

won the representation election that followed.

Timberland then failed to bargain with the union and an unfair labor practice charge was filed with the Board. Timberland's defense was that the Board unlawfully asserted jurisdiction in the first instance, and by agreement issues were limited by the evidence adduced at the representation hearing. The Board entered a summary order requiring Timberland to bargain and proceedings to enforce that order followed in the Circuit Court of Appeals.

On representation proceedings the NLRB's Regional Director found that the economic information submitted by Timberland was correct and acceptable and that it was clear that Timberland's participation in interstate commerce, although more than de minimus, was clearly below the NLRB's threshold standards in respect to retail, direct outflow, or direct and/or indirect inflow (Appendix "B" p. 2).

The only criterion that troubled the Regional Director was "indirect outflow", that is, sales to firms in the state but otherwise subject to NLRB jurisdiction. It appeared first that in the year under study Timberland received just over $17,000 for animal hides it sold to Pacific Hide and Fur, a local business previously held subject to NLRB jurisdiction. Timberland argued that only $7,000 of that amount should be included in the Regional Director's computations because its sale of hides was constant in numbers over the years, because $7,000 was the representative amount received, because the one larger receipt was due solely to an explosive market situation that year, and because its receipts for hides were already back down to $7,000 by the time of the hearing (Appendix "B", p. 3). It appeared second that Timberland sold meat worth a little over $20,000 to the Yogo Inn, a local hotel never held subject to NLRB jurisdiction. The NLRB has declared it will assert jurisdiction over a hotel if its annual gross exceeds $500,000. It appeared here that the Yogo Inn is a local business, that in its past history it has never exceeded $500,000 per annum, but that in the fiscal year that ended just before the representation hearing it did exceed that amount by just $18,000. Timberland argued that its sales to the Yogo Inn should not be included in the Regional Director's

computations because during the period its fiscal year under study overlapped that of the Yogo Inn the Yogo Inn did notgross $500,000 annually and because the Yogo Inn's later fiscal year was not representative of its annual volume.

If Timberland's sales to Pacific Hide and Fur were included at the representative figure and its sales to the Yogo Inn were excluded, its "indirect outflow" would have been well below the Board's minimum standard.

But the Regional Director did indeed include not only the sales to the Yogo Inn but the sales to Pacific Hide and Fur at the all-time high figure to find NLRB jurisdiction. He simply refused to apply the Board's "representative year" criterion to Timberland's operations even though the Board has declared that in applying its jurisdictional standards it uniformly relies on representative experience of an employer. Jos. McSweeney and Sons, Inc., 119 NLRB 1399, Cox's Food Center, 164 NLRB 95. The Regional Director did not suggest Timberland was speculating about future operations; on the contrary the evidence before him showed that Timberland's annual slaughter is constant, neither expanding nor diminishing. He specifically refused to apply the "representative year" criterion to the Board's indirect outflow standard (Appendix "B", p. 6); moreover, while he acknowledged Board precedent for finding jurisdiction over an employer in a year when its volume is unrepresentatively low, he refused to reject jurisdiction over an employer in a year when its volume is unrepresentatively high (Appendix "B", p. 5). In so doing the Regional Director made a snare and delusion of the Board's declared jurisdictional standards - he would apply them one way to generally large businesses but quite another way to generally small businesses.

This is a matter of substantial importance in law and should be reviewed by this enlightened court. It is a matter of vital importance in practice to the nation's army of small employers who rely on the Board's declared jurisdictional standards to avoid further entanglements with the federal bureaucracy. As this matter stands the Board is denying this small employer the benefit of the Act under which the Board's authority

is vested - after all Section 9(2) states that, "in determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the person filing the petition or the kind of relief sought...".

On proceedings by the NLRB in the Circuit Court to secure judicial sanction of its bargaining order the Circuit Court, with all respect, failed to come to grips with the real issue. That court was led into speaking of Timberland's "forecasts" and "predictions" of future operations (Appendix "A", p. 3) even though the record shows Timberland made none at any point - the only evidence Timberland submitted was entirely mathematical. The Regional Director, however, did speculate. He considered the Yogo Inn's first time entry over the Board's threshold in its fiscal year ended just before the hearing (that fiscal year, again, only partially overlapping Timberland's year under study) and found jurisdiction on the absence of evidence. His conclusion: "There is nothing in the record, however, to indicate that these sales figures are not simply part of a trend in the growth of the business of the Yogo Inn (Appendix "B", p. 5). The Fourth Circuit holds that on a petition by the NLRB to enforce its order the burden is on the NLRB to demonstrate that there is substantial evidence in the record to support the findings underlying its order, NLRB v. Tamper, Inc. (1974) 552 F2d. 781. And the Ninth Circuit itself holds that such a case must be heard on the record as certified by the NLRB unless additional facts are added in the manner prescribed by the National Labor Relations Act. NLRB v. Sunshine Mining Co. (1940) 110 F2d. 780. Here the NLRB made no effort to establish a rising business trend from the Yogo Inn's past records nor from its post-hearing records.

But the disturbing part of the Circuit Court's decision from a judicial point of view, and the factor that makes it of substantial general import among the nation's business and labor community, and meritorious of this court's consideration, is the suggestion that the Circuit Court will not interfere with the Board's assertion of jurisdiction, after the fact, whether it was rightly or wrongly done. The Circuit Court stated (Appendix

"A", p. 3) that to require the Board to relinquish jurisdiction once it has been assumed, "would leave the employees, who have relied upon the Board's protection, at the mercy of the employer...". The Ninth Circuit has not indulged in this kind of social concern in the past and has in fact held that where the findings and conclusions of the Board are not supported by substantial evidence on the record as a whole, enforcement of an order of the Board would allow the Board to unjustly ignore its own guidelines. NLRB v. Welcome-America Fertilizer, (1971) 443 F2d. 19. It is respectfully submitted that this facet of the Circuit Court's decision is in itself worthy of this Court's consideration. Socially, employees who have engaged in union activities have the protection of state law where the NLRB is not involved, a fact specifically recognized by congress in the 1959 Amendments to the Act. 73 Stat. 519. Legally, to make of itself a rubber stamp is for the Circuit Court to deny the public the effective protection of the function of judicial review of administrative activities and, ultimately, administrative excesses.

REASONS FOR GRANTING THE WRIT

1.

The assertion of jurisdiction by the National Labor Relations Board over an admittedly small employer through the Board's refusal to apply its "representative year" criterion to that employer's "indirect outflow" is of concern to all small employers in the nation. Such employers, relying on the Board's declared jurisdictional standards and precedents, are in unknowing jeopardy while the Board in the unpublished decisions of its Regional Directors, as in this case, departs from those standards in individual instances. In this case the Board itself, through its Regional Director, recognized there is no precedent for the proposition that an admittedly small employer, who momentarily pops above the Board's threshold standards, should be held outside the exercise of the Board's jurisdiction absent facts warranting the exercise of such jurisdiction in spite of small volume (Appendix "B", p. 5). It is time such precedent is made.

Without it the nation's small employers are operating at the whim of the Board's Regional Directors and not under law.

2.

The opinion of the United States Court of Appeals for the Ninth Circuit in this case implies that a decision on the part of the Board to exercise jurisdiction, whether lawful or not will not be disturbed by the courts for fear of leaving employees unprotected. This suggests an outright abdication of the function of judicial review and a disregard of congressional policy leaving to the States the matter of labor protection where Board jurisdiction is not exercised. This is a matter of first impression in this court in this area, it is of importance to the nation's small business and labor alike, and it merits and needs the consideration of this court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Thomas H. Mahan
Northwestern Bank Building
Helena, Montana 59601
Counsel for Petitioner

Of Counsel
Robert L. Johnson
507 Montana Building
Lewistown, Mt. 59457

CERTIFICATE OF SERVICE

This is to certify that I have mailed the requisite number of copies of the foregoing petition to counsel of record this 15th day of August, 1977.

Robert L. Johnson

(FILED Mar 18 1977
Emil E. Melfi, Jr.
Clerk, U.S. Court of
Appeals)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,)
Petitioner,)
vs.) No. 76-1300
TIMBERLAND PACKING CORPORATION,) OPINION
Respondent.)
)

Petition to review a decision of the
National Labor Relations Board

Before: DUNIWAY, ELY and CHOY,
Circuit Judges

DUNIWAY, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order issued on November 24, 1975, and reported at 221 NLRB 728. The sole issue is whether the Board properly asserted jurisdiction over Timberland Packing Corporation.

Clearly, Timberland's activities have sufficient impact on interstate commerce to come within the Board's jurisdiction under the National Labor Relations Act, as amended, 61 Stat. 136, 73Stat. 519, 29 U. S. C. §151 et seq. (1970). See NLRB v. Fainblatt, 1939, 306 U. S. 601, 607; NLRB v. Inglewood Park Cemetery Association, 9 Cir., 1966, 355 F. 2d 448, 451.

The Board, however, because it lacks the time and resources to exercise jurisdiction over every enterprise which may come within its statutory jurisdiction. has developed administrative standards whereby it limits its assertion of jurisdiction to classes of enterprises which meet a required annual dollar volume of business. non-retail enterprises, such as Timberland, the Board has announced that it will assert jurisdiction over such a business if it has any interstate inflow (purchases) or outflow (sales) of at least $50,000 annually. Andover Protective Service, Inc., 1976, 225 NLRB No. 64; Siemons Mailing Service, 1985, 122 NLRB 81, 85. This is measured in two ways, directly by purchases from or sales to out-of-state enterprises, or indirectly either by sales to in-state users meeting any of the Board's jurisdictional standards (except the indirect standards) or by purchases from local businesses of goods originating outside

the state.

When applying its jurisdictional amount standards, the Board has consistently refused to consider expected or predicted changes in business volume; it has based its determination upon a more objective standard, the figures for the most recent calendar year or fiscal year, or the year just before the Board hearing. Jos. McSweeney & Sons, Inc., 1958, 119 NLRB 1399, 1401; Aroostook Federation of Farmers, Inc., 1955, 114 NLRB 538, 539.

The extent to which the Board "Chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's discretion,... and is not a question for the courts,... in the absence of extraordinary circumstances, such as unjust discrimination" (citations omitted). NLRB v. Carroll-Naslund Disposal, Inc., 9 Cir., 1966, 359 F2d 779, 780. Timberland argues that certain sales to in-state users which meet the Board's jurisdictional standards should not have been considered in determining whether Timberland's interstate volume of business exceeded the $50,000 standard. It maintains that the measuring year selected by the Board was not representative and that its selection amounted to unjust discrimination. We do not agree.

The Board found that Timberland satisfied the indirect outflow test in fiscal 1973 by selling approximately $74,400 worth of goods to four in-state businesses, each of which met the Board's jurisdictional standards. Timberland argues that approximately $37,400 of that total was based upon sales which should have been excluded. First, it says that $17,000 received from Pacific Hides was caused by an abnormally high price for hides in that year. Second, it says that $20,400 in sales to Yogo Inn should not have been included because Yogo Inn normally did not have a sufficiently high volume of sales to come within the Board's jurisdiction. Both of those arguments are based upon Timberland's forecasts of future sales, in the first case its own, and in the second case those of Yogo Inn.

Substantial evidence supports the Board's finding that Timberland satisfies the Board's indirect outflow standard for jurisdiction. The Board has declined to rely, and should not be forced to rely, upon a

business's predictions about its future operations. It is not arbitrary or discriminatory for the Board to use an objective test rather than one that rests upon a subjective prediction and may be entirely speculative. The representative year standard used by the Board was in conformity with its current practice and was not discriminatorily applied. Moreover, once the objective test is met, and the Board assumes jurisdiction, we will not require the Board to relinquish jurisdiction on the basis of predictions about the future or even on the basis of what actually happens in a later year. To do so would leave the employees, who have relied upon the Board's protection, at the mercy of the employer, and with no right again to call upon the Board to vindicate their rights. The Board has not abused its discretion.

The order of the Board will be enforced.

Form NLRB-4477
(11-63)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TIMBERLAND PACKING CORPORATION Employer 1/
and
LOCAL 479, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO Petitioner
Case No. 19-RC-6824

DECISION AND DIRECTION OF ELECTION 2/

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, hearings were held before hearing officers of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, 3/ the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 4/

2. The labor organization (s) involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: 5/

> All employees employed by the Employer at its Lewistown, Montana, operations, excluding office clerical employees, yard employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted

by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. 6/ Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by Local 479, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. 7/

Dated February 12, 1974 Charles M. Henderson
(SEAL) at Seattle, Washington Regional Director,
Region 19

1/ The Employer's name appears as amended at the hearing.

2/ An initial hearing in this matter was held on October 18, 1973. The undersigned Regional Director issued an Order Remanding Case for Further Hearing and Notice of Further Hearing on November 29, 1973. Pursuant to the aforementioned Order and Notice, a further hearing was conducted on December 11, 1973.

3/ Prior to closing the further hearing in this matter, the Hearing Officer and the parties agreed that the record would remain open for the receipt of additional documentation from the Employer with respect to the issue of the Board's jurisdiction in this matter. The Petitioner was granted a reasonable amount of time to

state any objections to any documentation so filed. The agreed-upon documentation was received in the Regional office on December 27, 1973, and on January 7, 1974. On January 25, 1974, the Regional office received the Petitioner's January 23, 1974, response to the Employer's submissions, which questioned certain assertions made by the Employer in affidavit form in its January 7 documentation. In its response, the Petitioner urged the undersigned to "carefully review" the information provided. I have done so and perceive no basis for finding that the Employer's submissions are either incorrect or otherwise unacceptable. I further find that the documentation provided by the Employer satisfies the requirements for which the record was held open. I hereby close the record in this proceeding and make use of the documentation provided to the extent it is relevant to the issue herein.

4/ The only issue in this proceeding is whether the Employer is engaged in commerce within the meaning of the Act. The Employer argues that it is not engaged in commerce and moves the Board to decline to assert jurisdiction herein. The Petitioner would find the Employer engaged in commerce and, further, would find that it would effectuate the purposes of the Act for the Board to assert jurisdiction.

The Employer is a Montana corporation engaged at Lewistown, Montana, in the slaughtering, rendering, buying and selling of livestock and the packing, curing, rendering, refining and selling of meats and meat products. Additionally, it engages in the manufacture and sale of hides, oil, glue, animal fertilizers and other products resulting from the slaughter of livestock. It sells its products to the general public at retail, sells to other wholesale and retail concerns at wholesale, performs custom slaughtering on a commission basis, and buys livestock on commission for one other wholesaler.

During the Employer's last completed fiscal year, ending on September 30, 1973, it made no sales and performed no services for customers outside the state of Montana, purchased all livestock within the state of Montana from Montana producers, made direct out-of-state purchases of supplies amounting to approximately $1000, purchased supplies of indeterminate

origin valued at approximately $2900 from firms within the state of Montana, and experienced a total volume of sales in the approximate amount of $242,000. Clearly, none of the amounts set forth above satisfy the Board's retail, direct outflow, or direct and/or indirect inflow standards. Siemons Mailing Service, 122 NLRB 81.

The applicable standard remaining for consideration is the indirect outflow standard. During its last fiscal year, the Employer sold $31,400 worth of goods to the Lewistown, Montana, outlet of the Buttrey Food Stores Division of Jewel Companies, Inc. The parties stipulated that the Board historically has asserted jurisdiction over this outlet and I take administrative notice of the fact that the Lewistown outlet individually met the Board's retail jurisdictional standards in case number 19-RC-5243, in accordance with the holding of Siemons in fn. 13 at p. 85 of the Board's published volumes. The record as a whole indicates that the Employer's sales to the Lewistown Buttrey store were representative of its operations generally. I therefore find that its sales of $31,400 should be included in the computation of the indirect outflow standard.

During the appropriate period the Employer also was paid $5,243.09 in commissions by Pierce Packing Company for the purchase of livestock for the latter. I take administrative notice of the fact that the Board has asserted jurisdiction over Pierce Packing, a wholesale concern, in numerous cases, including 19-CA-3534, 19-CA-3644, and 19-RC-4033. I therefore find that the Employer's performance of services in the amount of $5,243.09 should be included in the computation of the indirect outflow standard.

The Employer also sold $17,376.50 worth of animal hides to Pacific Hide and Fur Company in Lewistown, Montana. Pacific Hide is a wholesale tanner over whom the Board has asserted jurisdiction in numerous recent cases, including 19-CA-4679 and 19-CA-4701. The Employer herein would find the sales during its most recent fiscal year not to be representative of its sales to Pacific Hide and Fur generally, asserting that these sales have historically amounted to approximately $7000 per year. The Employer further contends that the number of hides it sells in any given year is relatively

constant and the greater dollar amount of sales during the period in question is a direct result of the laws of supply and demand which caused the price per hide to escalate sharply. The Employer asserts that the current price of hides is more in line with those experienced in prior years. There is clear precedent standing for the proposition that the Board will not decline to assert jurisdiction over an employer who historically has met the Board's jurisdictional standards prior to the year of observation, but who encounters an unrepresentative low year during the period under consideration by the Board. However, there is a paucity of cases standing for the opposite proposition. Certainly, it is clear that the Board will not use non-recurring capital expenditures as a basis for the assertion of jurisdiction. See Magic Mountain, Inc., 123 NLRB 1170. In Imperial Rice Mills, 110 NLRB 612, the Board did assert jurisdiction over an employer during a year of greater sales which was asserted to be unrepresentative by the employer therein. While, in that case, the Board appeared to place great reliance on the fact that the Employer was endeavoring to continue those sales which had contributed to its "high" year, there is nothing in the record herein to indicate that the instant Employer is not endeavoring likewise. Therefore, I find the Employer's sales to Pacific Hide and Fur should be included in the computation of the indirect outflow standard.

Additionally, during its last completed fiscal year, the Employer made sales in the amount of $20,400 to the Yogo Inn, a retail establishment, in Lewistown, Montana. The Employer herein asserts that those sales are a direct result of the involvement of different management personnel in the sales process. However, it urges the Board to find the Yogo Inn's total volume of retail sales amounting to $518,000 during its last completed fiscal year to be unrepresentative of the Yogo Inn's business generally. Testimony adduced at the hearing indicates that the Yogo Inn had never performed a volume of business this substantial in its history. There is nothing in the record, however, to indicate that these sales figures are not simply part of a trend in the growth of the business of the Yogo Inn. Further, while it might appear logical, I can find no authority for the

extension of the "representative year" criterion to the business of a "secondary" employer in the computation of commerce pursuant to the Board's indirect outflow standard. Therefore, I include the Employer's sales of $20,400 to the Yogo Inn in that computation.

Accordingly, on the basis of all the above and the record as a whole, I find that the Employer herein made sales during its last fiscal year totaling $74,419.59 to other employers engaged directly in commerce. Having found the Employer engaged in commerce within the meaning of the Act as set forth in Siemons, supra, I find that it will effectuate the purposes of the Act to assert jurisdiction herein.

There are approximately four employees in the unit found appropriate herein.

5/ The unit description is in accord with a stipulation of the parties.

6/ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236; N. L. R. B. v. Wyman-Gordon Company, 394 U. S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the Election. In order to be timely filed, such a list must be received in the Regional Office, 1000 Republic Building, 1511 Third Avenue, Seattle, Washington 98101, on or before February 19, 1974. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

7/ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board in Washington, D. C. This request must be received by the Board in Washington by February 25, 1974.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	No. 76-1300
v.	)	
TIMBERLAND PACKING CORPORATION, Respondent.	)	

JUDGMENT

Before: Duniway, Ely and Choy, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board to enforce its order dated November 24, 1975, directed against Respondent, Timberland Packing Corporation, Lewistown, Montana, its officers, agents, successors and assigns. The Court heard argument of respective counsel on January 11, 1977, and has considered the briefs and transcript of record filed in this cause. On March 18, 1977, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Timberland Packing Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 479, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, (hereinafter called the Union), as the exclusive bargaining representative of its employees in the employees in the following appropriate unit:

> All employees employed by the Employer at its Lewistown, Montana, operations, excluding office clerical employees, yard employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act(hereinafter called the Act).

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, bargain in good faith with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Lewistown, Montana, facility copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 19, (Seattle, Washington), after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered .

(c) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps have been taken to comply herewith.

Costs in this court in favor of the Petitioner and against the Respondent.

COSTS: BRIEF OF NLRB..... $ 78.00
REPRODUCTION OF RECORD..... 32.30
TOTAL $110.30

ENDORSED, JUDGMENT FILED AND ENTERED
/s/Emil E. Melfi
Emil E. Melfi
Clerk

SO ORDERED
/s/Ben C. Duniway,
Ben C. Duniway, Circuit Judge

/A TRUE COPY
ATTEST: May 19, 1977

/s/Walter Ely,
Walter Ely, Circuit Judge

Emil E. Melfi
Clerk/

by: /s/Bruce Cutler
Bruce Cutler, Deputy Clerk

/s/Herbert Y. C. Choy,
Herbert Y. C. Choy, Circuit Judge

APPENDIX
NOTICE TO EMPLOYEES
POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 479, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL--CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain in good faith with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All employees employed by the Employer at its Lewistown, Montana, operations, excluding office clerical employees, yard employees, guards and supervisors as defined in the Act.

TIMBERLAND PACKING CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 2948 Federal Building, 915 Second Avenue, Seattle, Washington 98101, Telephone 206--442-7472.

No. 77-274

In the Supreme Court of the United States

OCTOBER TERM, 1977

TIMBERLAND PACKING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-274

TIMBERLAND PACKING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

In an unfair labor practice proceeding brought against petitioner, the Board found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 61 Stat. 140, 141, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with Local 479, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, which had been certified by the Board as the collective bargaining representative of a unit of petitioner's employees. 221 NLRB 728. The court of appeals enforced the Board's order (Pet. App. A, pp. 1-3).

Petitioner's sole contention here is that the Board improperly asserted jurisdiction over it. The court of appeals correctly rejected this claim. There is, moreover, no conflict among the circuits and no question presented that warrants review by this Court.

1. Petitioner is a Montana corporation engaged in the slaughtering, rendering, buying and selling of livestock and the packing, curing, rendering, refining and selling of meats and meat products. Additionally, it manufactures and sells hides, oil, glue, animal fertilizers and other products resulting from the slaughter of livestock. It sells its products to the general public at retail, sells to other wholesale and retail concerns at wholesale, performs custom slaughtering on a commission basis, and buys livestock on commission for one other wholesaler (Pet. App. B, p. 3).

The Board found, based on its self-imposed jurisdictional standards,[1] that petitioner was subject to its jurisdiction because, during the fiscal year prior to the Regional Director's Decision and Direction of Election (Pet. App. B), it had sales of more than $70,000 to four instate businesses which themselves met the Board's jurisdictional standards[2] (Pet. App. B, p. 6). Thus, as the Regional

[1]There is no issue presented here of the Board's jurisdiction under the Commerce Clause. As this Court has stated, the Act's operation does not "depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis.*" *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601, 607. However, the Board has recognized the administrative impossibility of taking cognizance of all cases within its statutory authority. Accordingly, it has developed standards whereby it will assert jurisdiction only over certain classes of enterprises where they meet a required annual dollar volume of business. It is the application of those administrative standards that is in issue here.

[2]The Board asserts jurisdiction over non-retail enterprises, such as petitioner, where there have been, *inter alia*, purchases or sales of at least $50,000 annually from and/or to other enterprises in the same state which themselves meet the Board's jurisdictional standards. *Siemons Mailing Service*, 122 NLRB 81, 85. The Board bases its determination of whether an enterprise meets that jurisdictional standard on the figures for either the most recent calendar

Director found (Pet. App. B, p. 4), petitioner sold $31,400 worth of goods to the Lewistown, Montana, outlet of the Buttrey Food Stores, Division of Jewel Companies, Inc., a retail concern over which the Board has asserted jurisdiction. Petitioner also was paid $5,243.09 in commissions for purchases of livestock by Pierce Packing Company, a wholesale concern over which the Board has asserted jurisdiction (*ibid.*). Additionally, petitioner sold $17,376.50 worth of animal hide to Pacific Hide and Fur Company in Lewistown, Montana, a wholesale tanner over which the Board has asserted jurisdiction in numerous cases (*ibid.*). And finally, petitioner had sales in the amount of $20,400 to the Yogo Inn, a hotel in Lewistown, Montana. In the last completed fiscal year Yogo Inn's total volume of retail sales amounted to $518,000, a sales volume sufficient to bring it within the Board's jurisdictional standards (Pet. App. B, p. 5).

2. Petitioner does not dispute these figures but contends that the year chosen as a basis for decision was not a "representative year"[3] and that in failing to decide the jurisdictional question on the basis of a representative year, the Board unconstitutionally deviated from its normal practice.

or fiscal year or the year just before the Board hearing. *Twenty-First Annual Report of the National Labor Relations Board* (1956), pp. 10-11; *National Labor Relations Board* v. *George J. Roberts & Sons, Inc.*, 451 F. 2d 941, 944 (C.A. 2); *Aroostook Federation of Farmers, Inc.*, 114 NLRB 538, 539; *Jos. McSweeney & Sons, Inc.*, 119 NLRB 1399, 1401; *Decker Disposal, Inc.*, 171 NLRB 879, 883-884.

[3]Petitioner argues (Pet. 3-4) that the Board failed to apply such a standard to it because (1) the price of hides in 1973 was abnormally high, thus its sales to Pacific Hide should be discounted; and (2) its sales to Yogo Inn should not be included because the Inn's gross in 1973 was abnormally high and in a typical year would not meet the Board's jurisdictional standards.

Contrary to petitioner's argument, however, the Board does not employ a representative year criterion in the circumstances of this case.[4] In such circumstances, the Board consistently has used the figures of the most recent calendar or fiscal year, or the year just before the Board hearing, in applying its jurisdictional standards (see note 2, *supra*). Moreover, the Board consistently has rejected arguments, such as petitioner's, that the year selected under its objective standard reflects an aberrational occurrence absent which the jurisdictional amount would not be met. See, *e.g., Imperial Rice Mills, Inc.*, 110 NLRB 612; *Bischof Die and Engraving*, 114 NLRB 1346, 1347. As the court of appeals stated (Pet. App. A, pp. 2-3):

> The Board has declined to rely, and should not be forced to rely, upon a business's predictions about its future operations. It is not arbitrary or discriminatory for the Board to use an objective test rather than one which rests upon a subjective prediction and may be entirely speculative.[5]

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[4]The concept of a "representative" period applies only to situations in which the employer is newly established and therefore does not have a year's worth of business to measure. In such cases the Board follows "its established policy of asserting jurisdiction if representative figures for a shorter period indicate [ ] a 'reasonable expectation' that the standard for annual volume of business [will] be met during a year." *Seventeenth Annual Report of the National Labor Relations Board (1952)*, p. 10 (footnotes omitted). See *General Seat and Back Mfg. Corp.*, 93 NLRB 1511, 1512; *Marston Corporation*, 120 NLRB 76; *United Slate Workers, Local No. 57*, 131 NLRB 1267, 1268; *Wallace Shops, Inc.*, 133 NLRB 36.

[5]Petitioner (Pet. 5) misreads the opinion of the court of appeals as suggesting that the court "will not interfere with the Board's assertion of jurisdiction after the fact, whether it was rightly or wrongly done." The court did not here validate what it believed to be an improper assertion of jurisdiction "for fear of leaving employees unprotected" (see Pet. 7). Rather, the court held that, once jurisdiction was properly asserted under the Board's objective standards, it would not be lost merely because an unusual occurrence caused the employer temporarily to fall below those standards (see Pet. App. A, p. 3). Cf. *Cox's Food Center, Inc.*, 164 NLRB 95 (strike caused temporary diminution of business).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

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